Supreme Court, U.S.
FILED
1 07-548 OCT 23 2007
OFFICE OF THE CLERK

No. 07-__

IN THE

Supreme Court of the United States

CURTIS A. BEASLEY,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 23, 2007

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QUESTIONS PRESENTED

21 U.S.C. § 851(a) requires the government to file a notice "before trial" if it intends to seek an enhanced punishment for a drug offense based on the defendant's prior criminal conviction. In this case, the government did not provide notice "before trial," but provided it after the jury had been selected.

1. Whether the failure to provide timely notice under Section 851(a) jurisdictionally bars a court from imposing an enhanced sentence.

2. Whether notice is untimely under Section 851(a) when it is not provided until after trial has commenced but before the jury selection has been completed.

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CURTIS A. BEASLEY, PETITIONER,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Curtis Beasley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-12a) is published at 495 F.3d 142. The district court's judgment (Pet. App. 13a-18a), entered on August 24, 2004, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

21 U.S.C. § 841(a) provides in relevant part: "[I]t shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense . . . a controlled substance."

21 U.S.C. § 841(b)(1)(B) provides in relevant part:

> In the case of a violation of subsection (a) of this section involving . . . (iii) 5 grams or more of a mixture or substance . . . which contains cocaine base . . . such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment . . . .

21 U.S.C. § 851(a)(1) provides: "No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon."

STATEMENT OF THE CASE

Federal law permits the government to request the imposition of an enhanced sentence for repeat offenders in certain drug cases by providing notice of its intent to rely upon a prior conviction to the court and the defendant "before trial." 21 U.S.C. § 851(a)(1). In this case, the government failed to provide timely notice, but the petitioner did not object. The district court then applied the sentencing enhancement. On appeal, the Fourth Circuit held that the statute requiring pre-trial notice is not jurisdictional and is therefore waivable, expressly rejecting the Eleventh Circuit's contrary holding that the district court's power to impose the enhancement is conditioned on the government's timely filing of notice. The court of appeals further held that any error by the district court was not plain and therefore

was not cognizable because there was no controlling precedent in the Fourth Circuit or from this Court, even though several courts of appeals had already held that notice must be provided prior to jury selection.

1. Under federal law, any person who manufactures, distributes, or possesses with the intent to manufacture or distribute five grams or more of crack cocaine is subject to a sentence of imprisonment of between five and forty years. 21 U.S.C. § 841(a)(1)(A). Federal law also allows the government to request an enhanced sentence for repeat drug offenders. 21 U.S.C. 841(b)(1)(B). However, the government's ability to seek that enhanced sentence is expressly conditioned on its compliance with certain procedural requirements. Specifically, the base sentencing range will apply "unless *before trial*" the government "files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." 21 U.S.C. § 851(a)(1) (emphasis added). When the government thus provides timely notice, the district court can impose a sentence in the significantly higher range of ten years to life imprisonment. 21 U.S.C. § 841(b)(1)(B).

2. In March 2003, petitioner Curtis Beasley was indicted on various federal drug charges. The parties selected the jury on January 6, 2004. Six days after jury selection, the government served the court and the petitioner with notice under 21 U.S.C. § 851(a)(1). The petitioner did not object to the untimely notice. The district court subsequently swore in the jury, after which the petitioner was tried and ultimately convicted.

At sentencing, the district court held that, as a consequence of the government's § 851(a)(1) submission, petitioner's applicable statutory sentencing range was enhanced to ten years to life

imprisonment. Absent the § 851 enhancement, the federal sentencing guidelines' recommended sentencing range would have been 262 to 327 months in prison. Pet. App. 4a. With the enhancement under § 841(b)(1)(B), however, the recommended sentencing range increased to 360 months to life imprisonment. The court sentenced the petitioner to 408 months of imprisonment, to be followed by eight years of supervised release. *See* Pet App. 14a.

3. Petitioner appealed the sentencing enhancement. The United States did not object to the petitioner's raising the issue for the first time on appeal; to the contrary, it specifically urged the Fourth Circuit to review the claim *de novo*. *See* U.S. C.A. Br. 12. The court of appeals held, however, that plain error review applied.

The court first held that plain error review was appropriate because, in its view, compliance with the notice requirement of § 851(a)(1) is not jurisdictional. Pet. App. 4a. The court reasoned that "when a district court imposes a sentence outside of the statutory range . . . it is not acting without power, it is exercising its power erroneously." *Id.* at 5a-6a (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998)). The court noted that its holding on that question was consistent with the rulings of several circuits, but was in direct conflict with the law of the Eleventh Circuit. *Id.* 7a (citing *Harris v. United States*, 149 F.3d 1304, 1306 (11th Cir. 1998)).

Applying the plain error standard, the court of appeals held that "there can be no plain error where there is no precedent from the Supreme Court or this court directly resolving" the issue. Pet. App. 10a (quotations and citations omitted). The court accordingly held that the failure to provide notice as mandated by the statute was not plain error, even though every published opinion of every court of appeals to address the question had held that §

851(a)(1) notice must be provided prior to jury selection. Pet'r C.A. Br. 13; *infra* at 11.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three reasons. First, as the Fourth Circuit acknowledged, its holding that § 851(a)(1) is not a limit on the district court's jurisdiction squarely conflicts with the law of the Eleventh Circuit. Second, the Fourth Circuit's holding that error cannot be "plain" if there is no on-point precedent within the circuit or from this Court conflicts with the decisions of several other courts of appeals, which have held that a uniform line of out-of-circuit authority can establish that an error is "plain." Finally, given the frequency with which sentences are enhanced in accordance with § 851, the question arises with some frequency and is important to the administration of federal criminal procedure.

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE CONFLICT IN THE CIRCUITS CONCERNING WHETHER § 851(A)(1) IS JURISDICTIONAL AND THUS NOT SUBJECT TO FORFEITURE.

1. The courts of appeals have issued conflicting decisions concerning whether the government's compliance with 21 U.S.C. § 851(a)(1) is a jurisdictional requirement, which must be reviewed *de novo*, or whether the error is subject to forfeiture and hence subject to plain error review. The Fourth Circuit held in this case that § 851(a)(1) is not jurisdictional. *See* Pet. App. 2a. As the court of appeals noted, the First and Seventh Circuits agree. Pet. App. 7a (citing, *e.g.*, *United States v. Ceballos*, 302 F.3d 679, 690-92 (7th Cir. 2002); *Prou v. United States*, 199 F.3d 37, 43-46 (1st Cir. 1999)).

As the Fourth Circuit recognized, however, the Eleventh Circuit has squarely held to the contrary.

Pet. App. 7a; *Harris v. United States*, 149 F.3d 1304, 1306 (11th Cir. 1998). In *Harris*, the defendant pleaded guilty to drug charges and his sentence was enhanced even though the government did not provide timely notice under § 851(a)(1). The defendant did not object to the late notice. The Eleventh Circuit nonetheless reversed. The court explained that the "Eleventh Circuit and its predecessor court have unambiguously and repeatedly held that a district court lacks jurisdiction to enhance a sentence unless the government strictly complies with the procedural requirements of § 851(a)." *Id.* at 1306 (citing *United States v. Olson*, 716 F.2d 850, 853 (11th Cir. 1983); *United States v. Cevallos*, 538 F.2d 1122, 1125 n.4 (5th Cir. 1976); *United States v. Noland*, 495 F.2d 529, 533 (5th Cir. 1974)). Quoting one of its prior decisions, the Eleventh Circuit explained that:

> An enhanced sentence is a special remedy prescribed by the Congress; prosecutorial discretion is vested in the executive branch of the government, and the district court has no authority to exercise it or pretermit it. As we have pointed out, Congress advisedly vested this discretion in the prosecutor. Unless and until prosecutorial discretion is invoked and the government files and serves an information as required by Sec. 851, the district court has no power to act with respect to an enhanced sentence; it can no more enhance the sentence than it could impose imprisonment under a statute that only prescribes a fine. Harmless error cannot give the district court authority that it does not possess.

Id. at 1306 (quoting *Olson*, 716 F.2d at 853). Accordingly, in *Harris*, the court of appeals reaffirmed its view that "Congress could not have

more clearly evinced its purpose" in authorizing enhanced sentences pursuant to § 851 only when the government seeks such enhancement by filing an information before trial or plea. *Id.* at 1307.

As the Fourth Circuit recognized, Pet. App. 7a, the conflict between its ruling and the Eleventh Circuit's holding is irreconcilable. In the Eleventh Circuit, the enhancement of petitioner's sentence would have been reversed. That court would find it determinative that the prosecution had not, through timely notice, conferred on the district court the authority to impose the enhanced sentence.

This conflict is squarely presented by this case. The issue was directly addressed below. The Fourth Circuit also observed that the question is outcome determinative, because the application of § 851 substantially enhanced petitioner's sentence. Pet. App. 4a. A ruling in petitioner's favor would have reduced the recommended guidelines range by 81 months.

2. The Fourth Circuit's decision was moreover erroneous. It is beyond question that Congress has the power to set the statutory ranges for various criminal offenses. *United States v. Booker*, 543 U.S. 220, 246 (2005); *cf. Bowles v. Russell*, 127 S. Ct. 2360, 2364 (2007). The mandatory provisions of 21 U.S.C. § 851(a)(1) demonstrate Congress's intent to exercise that authority to limit the jurisdiction of the federal courts when enhancing sentences based on prior convictions. The statute provides:

> No person who stands convicted of an offense under this part [21 U.S.C. § 841 *et seq.*] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a

> copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

Just last Term, this Court made clear that a party's failure to file a timely notice of appeal constitutes a jurisdictional defect. *Bowles*, 127 S. Ct. at 2364 (2007). The United States' failure to file a timely notice under § 851(a)(1) is no different. In both cases, Congress has exercised its authority to establish procedural prerequisites to the invocation of a court's powers – in *Bowles*, the court of appeals' power of review; in this case, the sentencing court's power to consider an enhanced sentence. In both cases, the required notice and its deadline perform the same important functions: when timely filed, the filing puts the opposing party on notice that a special power of the court is being invoked; and when the time for the filing has passed, the deadline provides the opposing party a right of repose that is not to be disturbed.

Strict observance of the requirements of § 851(a)(1) is also required to give effect to Congress's determination that the decision whether to seek an enhancement belongs to the prosecution—subject to procedural protections for the defendant—and not to the courts. Both the extent of the prosecutor's discretion and the strict limits on how that discretion may be exercised demonstrate Congress's intent that executive branch compliance with § 851(a)(1) be necessary to trigger the jurisdiction of the courts. *See United States v. Cespedes*, 151 F.3d at 1333. In § 851, Congress struck a balance between the authority of prosecutors to seek enhanced sentences—sentences that can dramatically increase a defendant's punishment--and the need to provide fair notice and procedural protections to defendants who suddenly find themselves facing a significantly increased sentence. When courts fail to enforce the procedural protections and limitations that Congress prescribed,

courts displace the careful balance that Congress struck and, in effect, permit a sentence to be imposed in a manner that Congress forbade. Indeed, courts have relied on the fact that § 851 provides only a narrow window in which the government may seek an enhancement to demonstrate that the delegation of legislative authority to the executive branch is constitutional. *Cespedes*, 151 F.3d at 1333; *see also United States v. Jensen*, 425 F.3d 698 (9th Cir. 2005). If the power to seek an enhancement is constitutionally delegated to the executive branch only because there are strict conditions, courts ignore Congress's intent to comply with our system of separated powers when they exercise jurisdiction to enhance sentences when the prosecutor has failed to comply with the commands of the statute. Unless the prosecutor files an information before trial providing notice of its intent to seek an enhanced sentence, a court lacks jurisdiction to enhance the sentence.

This Court has held that the decision to provide notice under § 851(a)(1) is similar to a charging decision. That is, the "discretion [to determine whether a particular defendant will be subject to the enhanced statutory maximum] is an integral feature of the criminal justice system." *United States v. LaBonte*, 520 U.S. 751, 762 (1997); *see also Cespedes*, 151 F.3d at 1333. A court has no greater jurisdiction to enter an enhanced sentence without a proper information from the prosecution than it would hold to enter a judgment of conviction in the absence of a criminal charge. Like charging decisions, the decision to file a § 851(a)(1) notice is within the discretion of the executive branch, and courts cannot exercise jurisdiction to undermine that discretion. *See In re Ellis*, 356 F.3d 1198 (9th Cir. 2004).

The court of appeals erred in concluding that its contrary holding was compelled by *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998), and *Jones v. United States*, 527 U.S. 373, 386-

88 (1999). In *Steel Co.*, this Court held that a substantive legal question going to the merits of a cause of action—whether the Emergency Planning and Community Right-To-Know Act of 1986 permits citizen suits for purely past violations—was not jurisdictional and did not need to be addressed before the issue of standing: "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." 523 U.S. at 89. That holding has no bearing on the proper construction of § 851. This case concerns the compliance with procedural requirements that Congress statutorily commanded to be fulfilled before a prosecutor can seek, and a court can impose, an enhanced sentence.

The court of appeals' reliance on *Jones v. United States* (Pet. App. 6a), fares no better. In *Jones*, the defendant was convicted of capital murder for a killing committed in the course of a kidnapping. 527 U.S. at 387-388. He objected to the jury instructions and decision forms. *Id.* Jones argued that, although he had failed to raise those objections before the jury retired, the Federal Death Penalty Act created an exception to plain error review for such claims. *Id.* This Court rejected that argument, in large part because the Act contained a provision that explicitly required defendants to preserve allegations of errors in accordance with the rules of criminal procedure. *Id.* at 389. § 851, by contrast, lacks any such limitation. Beyond that, § 851(a)(1)'s requirements are preconditions to the prosecutor's power to charge and the court's power to sentence; they are not routine rules of trial procedure.

II. THE FOURTH CIRCUIT'S HOLDING THAT A UNIFORM LINE OF AUTHORITY FROM OTHER CIRCUITS CANNOT RENDER AN ERROR "PLAIN" CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND OF THIS COURT.

Having ruled, in conflict with the Eleventh Circuit, that the government's failure to comply with § 851(a)(1) was subject to plain error review, the Fourth Circuit proceeded to create a second circuit split on the application of the plain error doctrine. That ruling, which is also incorrect, warrants review by this Court as well.

1. As a judge of the Fourth Circuit previously recognized, "[e]very court of appeals to have addressed [the issue] in a published opinion has concluded that before trial [in § 851] means before jury selection begins (which is obviously also before the jury is sworn)." *United States v. Jones*, 78 Fed. App'x 844, 856 (4th Cir. 2003) (Michael, J., dissenting).[1] In *United States v. Johnson*, 944 F.2d 396 (1991), the Eighth Circuit held that "before trial" means "before jury selection," *id.* at 407. The court explained that reading "before trial" to mean what it says "allows the defendant ample time to determine whether he should enter a plea or go to trial, and to plan his trial strategy with full knowledge of the consequences of a potential guilty verdict." *Id.* Furthermore, enforcing § 851(a)(1) according to its terms would not overly burden the government because § 851(a)(1) allows the government to seek a

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[1] The only contrary appellate authority of which petitioner is aware is the unpublished decision in *United States v. Galloway*, No. 94-3173, 1995 WL 329242, at *8 (6th Cir. May 31, 1995).

postponement of a trial if it encounters difficulty discovering a defendant's prior convictions. *Id.*

The First, Second, Seventh, and Tenth Circuits have likewise held that, unless the government files the required information with the court prior to the commencement of jury selection, the information is untimely, such that the district court lacks the power to enhance the defendant's sentence pursuant to § 851. *See Prou v. United States*, 199 F.3d 37, 48 (1st Cir. 1999); *Kelly v. United States*, 29 F.3d 1107, 1110 (7th Cir. 1994); *United States v. Gonzalez-Lerma*, 14 F.3d 1479, 1484 (10th Cir. 1994); *United States v. White*, 980 F.2d 836, 842 (2d Cir. 1992). Additionally, the Eleventh and D.C. Circuits have held an information timely filed where the government provided notice of its intention to file the information "prior to selection of the jury." *See United States v. Weaver*, 905 F.2d 1466, 1481 (11th Cir. 1990); *United States v. Brown*, 921 F.2d 1304, 1309 (D.C. Cir. 1990).

2. The Fourth Circuit failed to consider whether this uniform line of authority had any bearing on whether the trial error was "plain." Pet. App. 7a-10a. Adopting the position of the Eleventh Circuit, the court of appeals held that, if the statutory language is arguably ambiguous, there can be no plain error unless there is controlling in-circuit or Supreme Court precedent directly resolving the question in the defendant's favor. Pet. App. 9a (citing *United States v. Lejarde-Rada*, 319 F.3d 1288 (11th Cir. 2003)). "Because there is no controlling precedent—either in the Supreme Court or in our court—on the issue of when a trial begins for purposes of defining 'before trial' in § 851(a)," the court held, "we cannot say that it was error for the district court to assume that a § 851 information filed after the jury was selected but before it was sworn was timely filed." *Id.*

The Eleventh Circuit has held the same. *See Lejarde-Rada*, 319 F.3d at 1291 (11th Cir. 2003) (holding that, where the explicit language of a statute or rule does not specifically resolve an issue, "there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it"); *United States v. Magluta*, 198 F.3d 1265, 1280 (11th Cir. 1999) ("[A] district court's error is not 'plain' or 'obvious' if there is no precedent directly resolving an issue.").

Although consistent with the law of the Eleventh Circuit, the Fourth Circuit's construction of the plain error rule conflicts with the decisions of several other circuits that rely on out-of-circuit authority to find an error "plain." In *United States v. Gore*, for example, the Second Circuit held that:

> [t]he lack of this Court's precedent directly on point . . . will not prevent the district court's error from being deemed 'plain' because this is not a case in which we have taken no position on a certain issue and upon which no other circuit has spoken, or upon which there is a sharp dispute among the other circuits.

154 F.3d 34, 43 (2d Cir. 1998). The court then found plain error in the district court's application of a federal drug trafficking provision. The court explained that, even though "[t]his Court . . . has not yet addressed directly the application of Double Jeopardy . . . [to] § 841(a)(1) . . . other circuits have uniformly decided" that in § 841 Congress did not intend for multiple punishments to be based on a single quantity of drugs, and that analogous cases from this Court and the Second Circuit supported that conclusion. *Id.* Consequently, the court held that "the rules laid out in [this Court's previous cases], the uniform holdings of our sister circuits, and our own line of cases are relevant precedents with a sufficient level of specific applicability to the facts of

this case so that the district court's error was clear and obvious under the law at the time of [the defendant's] trial." *Id.* at 47.

Since *Gore*, the Second Circuit has reiterated the importance of looking at cases from other circuits when performing plain error review. *See United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) ("It may be appropriate for this Circuit to find an error plain, even in the absence of binding precedent from the Supreme Court or this Circuit, where other circuits have uniformly taken a position on an issue that has never been squarely presented to this Court."); *United States v. Brown*, 352 F.3d 654, 664 (2d Cir. 2003) ("We can, in certain cases, notice plain error in the absence of direct precedent, or even where uniformity among the circuits, or among state courts, is lacking.").

Five other courts of appeals have likewise looked to precedent from their sister circuits to justify a finding of plain error, even where the specific error at issue had not been addressed previously by the reviewing court. For example, in *United States v. Hardwell*, the Tenth Circuit held that it was sufficient to render an error "plain" that precedent from other circuits supported the defendant's claim on appeal. 80 F.3d 1471, 1484 (10th Cir. 1996). "Although neither the Supreme Court nor this court has decided this issue," the court wrote, "given the weight of authority from other circuits, we conclude that the error was sufficiently clear and obvious to be plain error . . . ." *Id.*

The First, Fifth, Seventh, and Ninth Circuits have reached the same conclusion. *See United States v. Munoz-Franco*, 487 F.3d 25, 56 (1st Cir. 2007) (holding that, "consistent with recent circuit court decisions" in four other circuits, the district court plainly erred); *United States v. Chea*, 231 F.3d 531, 537 (9th Cir. 2000) (finding plain error, and noting that "[w]hile we have not previously considered

whether [this error] is plain error, other circuits have, and have concluded that it is"); *United States v. Leonard*, 157 F.3d 343, 345-46 (5th Cir. 1998) (acknowledging that a claim was "*res nova* in this Circuit," but finding plain error anyway where four other circuits recognized the alleged error); *United States v. Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994) (holding that "[i]n light of [our previous cases,] as well as the fact that each of the other circuits has determined that [the district court's action is erroneous], we are of the opinion that it was plain error").

3. The Fourth Circuit's plain error standard is not only contrary to the majority rule in the circuits, but is also wrong. Under Federal Rule of Criminal Procedure 52(b), "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Thus, the threshold inquiry under Rule 52(b) is whether "the error is clear under current law," not whether there happens to be binding precedent within a particular geographic jurisdiction. *See United States v. Olano*, 507 U.S. 725, 734 (1993).

There is no basis for the Fourth Circuit's view that "current law" means only the law of the court of appeals or this Court. As this Court observed in *United States v. Frady*, Rule 52(b) "reflects a careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly addressed." 456 U.S. 152, 163 (1982). Based on those two competing interests, this Court said that the Rule was "intended to afford a means for the prompt redress of miscarriages of justice." *Id.* When, as here, the error can be discerned from a straightforward reading of the statutory text and has been consistently construed by numerous courts of appeals, then the error can be "clear under current law" even before this Court speaks or the particular circuit in which the

defendant is convicted happens to confront the question. Moreover, if the Fourth Circuit had believed that the uniform authority of the other circuits was incorrect, it could have denied relief on that ground. Accordingly, the principal effect of the stringent rule of the Fourth and Eleventh Circuits is to deny relief when there is unquestionable error, but the issue simply has not yet arisen in those particular circuits. Denying relief in such circumstances does nothing to promote the balance of interests sought by Rule 52(b). The miscarriage of justice suffered by petitioner in this case would have been addressed had he found himself in any one of the six circuits to have confronted the question presented here. Unless there is substantial reason to believe that those circuits have misunderstood the law, justice is not served by denying relief based on an accident of geography or timing.

Moreover, the logic of the Fourth and Eleventh Circuit's rule predictably denies relief when relief is most warranted. One might reasonably expect that the most obvious and plain errors will arise the least frequently. Yet, unless the same error has previously arisen in that circuit, the Fourth and Eleventh Circuits would hold that the error is not "plain." Such a result not only leads to an "obvious injustice," *Frady*, 456 U.S. at 163, but is in conflict with this Court's teachings in the related area of qualified immunity from civil liability, in which the Court has made clear that the absence of directly on-point, controlling precedent does not mean that law is not "clearly established." *See Hope v. Pelzer*, 536 U.S. 730, 741-42 (2002); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (holding that "a consensus of cases of persuasive authority" would be sufficient to clearly establish a legal rule).

Directing the lower courts to consider out-of-circuit precedent also will aid the district courts that will inevitably decide *res nova* claims in the future, reduce the incidents of plain error, and avert

unnecessary litigation. In *Frady*, this Court stated that "recourse may be had to [Rule 52(b)] only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely [objection]." 456 U.S. at 163. Had the district court surveyed the law of the circuits on the meaning of "before trial" in § 851(a)(1) at the time of the petitioner's sentencing, and had the Fourth Circuit looked beyond its own cases at the time of the appeal, they would have found that every court of appeals to publish an opinion has determined that trial begins at jury selection. Consequently, the district court's error was sufficiently clear to fall within the meaning of "plain error" under Rule 52(b).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-4107

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

V.

CURTIS A. BEASLEY a/k/a Pooh,
DEFENDANT-APPELLANT.

Argued March 16, 2007.
Decided July 25, 2007.

Appeal from the United States District Court
for the District of South Carolina, at Greenville.
Henry M. Herlong, Jr., District Judge.
(CR-02-1358)

ARGUED: Fletcher N. Smith, Jr., Greenville, South Carolina, for Appellant. Regan Alexandra Pendleton, Assistant United States Attorney, Office of the United States Attorney, Greenville, South Carolina, for Appellee. ON BRIEF: Reginald I. Lloyd, United States Attorney, Columbia, South Carolina, for Appellee.

Before: NIEMEYER, MICHAEL, and GREGORY, Circuit Judges.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge MICHAEL and Judge GREGORY joined.

OPINION

NIEMEYER, Circuit Judge:

A jury convicted Curtis Beasley of conspiracy

to distribute at least 5 grams, but less than 50 grams, of crack cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1)(B), and possession of 5 grams or more of crack cocaine with intent to distribute, in violation of 21 U.S.C. § 841(b)(1)(B). Based on the fact that Beasley had twice before been convicted of felony drug offenses, the district court sentenced him to 408 months' imprisonment on each count, to run concurrently. *See* 21 U.S.C. § 841(b)(1)(B); U.S.S.G. § 4B1.1.

On appeal, Beasley contends for the first time that the district court was not authorized to rely on the enhanced penalties provided by § 841(b)(1)(B) for repeat drug offenders because the government did not file an "information" "before trial," as required by 21 U.S.C. § 851(a), and therefore did not provide him with timely notice of its intent to rely on his prior convictions to request increased punishment. The government filed a § 851 information one week after the jury had been selected but two weeks before the jury was sworn and opening statements were made. Beasley contends that because "before trial" requires the filing to be made before *jury selection begins,* the government did not comply with the procedural requirements of § 851, and therefore his sentence could not be increased based on his prior felony drug convictions. He argues that the § 851 process is not only a condition precedent to an increased punishment but also jurisdictional, entitling him to raise the issue for the first time on appeal.

We conclude that 21 U.S.C. § 851 is not jurisdictional and therefore is subject to the usual rules of procedural default. Because Beasley failed to object to the § 851 information below, he forfeited his claim, and we therefore conduct our review under the plain error standard of Federal Rules of Criminal Procedure 52(b). As Beasley failed to satisfy the criteria for noticing plain error, we reject Beasley's challenge based on an untimely filing of the § 851 information. We also reject Beasley's two challenges

to the district court's evidentiary rulings. Accordingly, we affirm.

I

Beasley's convictions for violating § 841(b)(1)(B) subjected him to an increased statutory penalty because he had a "prior conviction for a felony drug offense." 21 U.S.C. § 841(b)(1)(B). Without a prior conviction, Beasley faced a sentence of 5 to 40 years' imprisonment; with a prior conviction, however, he faced a sentence of 10 years' to life imprisonment, so long as the government elected to pursue the increased punishment by filing a § 851 information.

On January 12, 2004, more than two weeks before the jury was sworn and opening statements were made, the government filed and served a § 851 information indicating that it intended to rely on Beasley's two prior felony drug convictions to seek an enhanced sentence under § 841(b)(1)(B). By then, however, the jury had already been selected. Under the practice that the district court employed, the jury was selected on January 6, 2004, three weeks before swearing the jury and beginning with opening statements.

After receiving the § 851 information, Beasley filed several pre-trial motions, including a motion to dismiss, a motion to suppress, and a motion in limine, but he did not file any paper contesting the substance contained in the § 851 information or the information's timeliness.

After conviction and during sentencing, the district court assumed that the § 851 information had been timely filed, and, based on Beasley's prior felony drug convictions, enhanced Beasley's sentence. Thus, Beasley was subject to a maximum of life imprisonment under § 841(b)(1)(B), and his offense level, as determined by U.S.S.G. § 4B1.1, was 37,

yielding a recommended sentencing range of 360 months' to life imprisonment. The district court sentenced Beasley to 408 months' imprisonment and, as mandated by § 841(b)(1)(B), to 8 years of supervised release. In the absence of an increased statutory sentence, the Sentencing Guidelines would have recommended a sentence in the range of 262 to 327 months' imprisonment and 5 years' supervised release.

On appeal, Beasley contends for the first time that the § 851 information was filed untimely because it was not filed before the jury was selected. He also challenges two evidentiary rulings made by the district court at trial.

II

Beasley's challenge to the timeliness of the government's § 851 filing is raised for the first time here on appeal, and therefore we would ordinarily review the issue for plain error, unless § 851 were jurisdictional. If the procedural requirements of § 851 were jurisdictional, Beasley's challenge could be raised for the first time on appeal because any jurisdictional defect would "require correction regardless of whether the error was raised in the district court." *United States v. Cotton,* 535 U.S. 625, 630 (2002).

Beasley appears to be arguing that the requirements of § 851 were indeed jurisdictional, relying on *Harris v. United States,* 149 F.3d 1304, 1307 (11th Cir.1998). Accordingly, we address first the question of whether § 851 requirements are jurisdictional.

Subject matter jurisdiction concerns a court's very power to hear a case, and because "a court's power to hear a case can never be forfeited or waived," the lack of subject matter jurisdiction can be raised at any time. *Cotton,* 535 U.S. at 630. "Without jurisdiction the court cannot proceed at all in any

cause [except to] announc[e] the fact and dismiss[ ] the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869). If the requirements of § 851 were jurisdictional for purposes of increasing punishment under 21 U.S.C. § 841(b)(1)(B), under Beasley's argument we could not review the merits of whether punishment may be enhanced but could only dismiss the increased sentence.

Section 851(a) reads in pertinent part:

> No person who stands convicted of an offense under this part [21 U.S.C. § 841 *et seq.*] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

21 U.S.C. § 851(a)(1). On its face, this language does not confer jurisdiction or limit it, nor does it make the court's jurisdiction conditional. Rather, it imposes a condition on "*increased punishment* by reason of one or more prior convictions." *Id.* (emphasis added). Regardless of whether the condition is met, a district court derives its jurisdiction to determine the issue of increased punishment from 18 U.S.C. § 3231, which provides that the federal district courts "have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." It follows that "this jurisdiction necessarily includes the imposition of criminal penalties." *Prou v. United States*, 199 F.3d 37, 45 (1st Cir.1999).

Thus, when a district court imposes a sentence for a federal offense outside of the statutory range or when it ignores statutory mandates for sentencing,

such as are contained in 18 U.S.C. § 3553(a), it is not acting without power; it is exercising its power erroneously, which is subject to correction on review by appellate courts. *See Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 90 (1998) (differentiating between a court's power to hear a case-its subject matter jurisdiction-and its power to issue a remedy). In *Steel Co.*, the federal statute specified the limits of the district court's powers to grant relief, with Congress even using the word "jurisdiction" to describe those limits. *See Steel Co.*, 523 U.S. at 90. But the Supreme Court held that such rules of law "specifying the remedial powers of the court, viz., to enforce the violated requirement and to impose civil [or criminal] penalties," do not affect the court's jurisdiction. *Id.* (emphasis in original); *cf. Jones v. United States,* 527 U.S. 373, 386-88 (1999) (holding that the extra procedural safeguards found in the Federal Death Penalty Act for capital cases are subject to plain-error review). Thus, once a court has subject matter jurisdiction over a case it does not lose that jurisdiction by exceeding the court's remedial authority.

Section 851 simply specifies "remedial powers" of the court, regulating the level of a sentence that may be imposed in a federal criminal case, over which the district court otherwise has subject matter jurisdiction pursuant to 18 U.S.C. § 3231, and the district court is not stripped of jurisdiction when the government fails to comply with the provision's procedural requirements. Moreover, the requirements of § 851 can be waived by defendants, unlike genuine jurisdictional limits. While § 851 uses mandatory language, so do numerous other statutory and constitutional guarantees that are waivable. *See United States v. Mezzanatto,* 513 U.S. 196, 201-03 (1995) (listing examples). "A defendant who may waive indictment, despite the fifth amendment's unqualified language," may also "waive the filing of an information [under § 851] listing prior convictions." *United States v. Lawuary,* 211 F.3d 372,

379 (7th Cir.2000) (Easterbrook, J., concurring).

We conclude that the government's alleged failure to comply with the procedural requirements of § 851(a) renders erroneous a court's reliance on § 841(b)(1)(B) to enhance a sentence for repeat drug offenders, nothing more. *See United States v. LaBonte*, 520 U.S. 751, 754 n. 1 (1997). As such, a defendant's failure to object at trial to the untimeliness of the government's § 851(a) information constitutes a procedural default, permitting courts of appeal to review the issue only for plain error. In so concluding, we join several other circuits. *See, e.g., United States v. Flowers*, 441 F.3d 900, 903 (10th Cir.2006); *United States v. Ceballos*, 302 F.3d 679, 690-92 (7th Cir.2002); *United States v. Mooring*, 287 F.3d 725, 727 (8th Cir.2002); *Prou*, 199 F.3d at 43-46; *United States v. Vanness*, 85 F.3d 661, 663 n. 2 (D.C.Cir.1996). *But see Harris v. United States*, 149 F.3d 1304, 1306 (11th Cir.1998); *United States v. Hill*, 142 F.3d 305, 312 (6th Cir.1998).

III

Plain error review of Beasley's sentence is conducted pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure, which provides that "a plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Before an appellate court can notice and correct an error not raised at trial, the defendant must show that there is "(1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 467 (1997) (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)) (quotation marks and other citations omitted); *see also Cotton*, 535 U.S. at 631-32.

In this case, Beasley contends that the district court erred in imposing increased punishment based on an untimely filed § 851 information. He argues that when § 851(a) provides that the information must be filed "before trial," it requires that the information be filed before jury selection begins, which occurred in this case on January 6, 2004. The government argues that "before trial" means before the jury was sworn, which was on January 28, 2004. In this case, because of the practice followed by the district court, the jury was selected three weeks before it was sworn, and the government filed the § 851 information one week after jury selection and two weeks before the jury was sworn. Applying the criteria of Rule 52(b), we address whether the timing of the government's filing was plain error.

The operative language of § 851(a) directs that no person "shall be sentenced to increased punishment by reason of one or more prior convictions, unless *before trial*...the United States attorney files an information," identifying the convictions to be relied on. (Emphasis added). The primary purpose of this provision is to give the defendant notice of the government's intention to seek an enhanced sentence based on the defendant's prior convictions, giving the defendant an opportunity to challenge the use of the prior convictions and to prevent sentencing errors. *See United States v. Campbell,* 980 F.2d 245, 252 (4th Cir.1992) ("The purpose of the section 851 information is to give the person convicted and about to be sentenced as a second offender an opportunity to show that he is not the person previously convicted") (citation and quotation marks omitted). Another purpose is to provide the repeat drug offender with full knowledge before trial of the consequences of a guilty verdict, thereby enabling him to make informed decisions regarding the entry of a plea or the planning of trial strategy.

In this case, the government filed the § 851

information two weeks *before* the jury was sworn but *after* the jury had been selected. While Beasley filed three pretrial motions during the two weeks following his receipt of the § 851 information and before the jury was sworn, he did not file a motion challenging the § 851 information. Of course, he need not have filed such a motion if he had concluded that the government's § 851 information was filed "before trial."

The term "before trial" is surely ambiguous. We have observed that the beginning of trial may be defined differently in different contexts:

> As a general matter, it cannot be disputed that a "trial" is the judicial proceeding during which the law and the facts are examined to determine the issues between the parties. Accordingly, the beginning of this proceeding must be the first meaningful act in actually conducting the proceeding. And depending on the issue for determining what the first meaningful act is, the beginning of trial may be when the court calls the proceeding to order; or when the court calls the proceeding to order and all of the actors are present in the courtroom, including the jury venire; or when the process for the selection of jury begins; or when the jury is impaneled; or when the opening statements are made; or when the first witness is called.

DeLoach v. Lorillard Tobacco Co., 391 F.3d 551, 563 (4th Cir.2004).

Because there is no controlling precedent-either in the Supreme Court or in our court-on the issue of when a trial begins for purposes of defining "before trial" in § 851(a), we cannot say that it was error for the district court to assume that a § 851

information filed after the jury was selected but before it was sworn was timely filed. *See United States v. Lejarde-Rada,* 319 F.3d 1288, 1291 (11th Cir.2003) ("[W]here the explicit language of a statute or rule does not specifically resolve an issue, there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it"). Furthermore, for an error to be "plain," the error must be plain "under current law." *Olano,* 507 U.S. at 734. There was no controlling "current law" in this circuit on the meaning of "before trial" when Beasley was sentenced, nor is there any today. *See Johnson,* 520 U.S. at 468 (holding that "it is enough that an error be 'plain' at the time of appellate consideration"). Accordingly, the district court's assumption that the government filed its § 851 information "before trial" was not plain error, and therefore we will not take notice of it.

IV

Somewhat distinct from his § 851 argument, Beasley also contends that the district court violated his Sixth Amendment jury trial right when the court found the fact of his previous felony drug convictions, but this contention is directly foreclosed by *Almendarez-Torres v. United States,* 523 U.S. 224, 226 (1998). *See United States v. Booker,* 543 U.S. 220, 244 (2005); *United States v. Cheek,* 415 F.3d 349, 352-53 (4th Cir.2005).

Accordingly, we affirm Beasley's sentence.

V

Beasley also challenges two of the district court's evidentiary rulings, and we reject both challenges.

He contends first that the district court abused its discretion in allowing the government's expert witness, Investigator Lyle Kirian of the Greenville

County, South Carolina Vice and Narcotics Agency, to testify as an expert witness about the process of converting powder cocaine into crack cocaine without first testing the reliability of his testimony by conducting a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Supreme Court has stated that "the law grants a district court the same broad latitude when it decides how to determine [the] reliability [of expert testimony] as it enjoys in respect to its ultimate reliability determination." *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 142 (1999) (emphasis in original). Therefore the standard of review is for abuse of discretion. *See United States v. Grimmond*, 137 F.3d 823, 831 (4th Cir.1998) ("A district court's evidentiary rulings are reviewed under the narrow abuse of discretion standard"). Recognizing the broad latitude given to trial courts, we conclude that the district court did not abuse its discretion by not conducting a *Daubert* hearing in this case. Kirian's credentials, which were substantial, included: training in numerous law enforcement courses on the identification of narcotics, including identifying clandestine drug-making labs; participation as a member of a local narcotics agency in the seizure of cocaine in its various stages on its way to becoming crack cocaine; and witnessing on video the full process of turning powder cocaine into crack cocaine. This training and experience amply qualified Kirian to give testimony on the process of making crack cocaine from cocaine powder. Accordingly, the district court did not abuse its discretion in allowing him to testify as an expert, without conducting a *Daubert* hearing.

Finally, Beasley contends that the district court abused its discretion in denying his request for a contemporaneous limiting instruction under Federal Rule of Evidence 105 to instruct the jury when evidence was admissible against one party, but not another. Rule 105 provides that "the court, upon request, shall restrict the evidence to its proper scope

and instruct the jury accordingly," and we have held that the timing of such an instruction is left to the discretion of the trial court. *See Klein v. Sears, Roebuck & Co.*, 773 F.2d 1421, 1426 (4th Cir.1985) ("The more modern approach is to defer to the trial court's discretion as to the timing of the limiting instruction even in criminal trials"). In this case, the district court met its obligation under Rule 105 when it instructed the jury at the conclusion of the trial that it "is your duty to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants."

* * *

For the reasons given, we affirm the judgment of the district court.

AFFIRMED

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

UNITED STATES OF AMERICA,

V.

CURTIS A BEASLEY a/k/a Pooh

JUDGMENT IN A CRIMINAL CASE
(For Offense Committed On or After November 1, 1987)

Case Number: 6;02CR1358-3
US Marshal's Number: 91015-071

Fletcher N. Smith Jr. Retained
(Defendant's Attorney)

THE DEFENDANT: Was found guilty on counts 1g and 13g of the superseding indictment on February 3, 2004 after a plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 846, 841(a)(1)	Please See Indictment	3/12/03	1g
21 U.S.C. § 841(a)(1) § 841(b)(1)(B)	Please See Indictment	10/31/02	13g

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Count 1 of the original indictment is dismissed on the motion of the United States.

It is ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitutions, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court or United States attorney of any material change in the defendant's economic circumstances.

August 23, 2004

Henry M. Herlong, Jr., U. S. District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of four hundred eight (408) months. This term shall consist of 408 months on each of counts 1g and 13g, to be served concurrently.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

—

Defendant delivered on 10-25-04 to XCI – Edgefield at Edgefield, SC, with a certified copy of this judgment.

John J LaManna
Warden

By R. Paul
LIE

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of eight (8) years. This term shall consist of 8 years on count 1g and 5 years on count 13g, to be served concurrently.

1. The defendant shall participate in a program of testing and treatment for substance abuse as directed by the United States Probation Officer until released from the program by the officer.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994: The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments act set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall comply with any additional conditions to the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) The defendant shall support his or her dependents and meet other family responsibilities;

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to controlled substances, except as prescribed by a physician;

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$200.00	$___	$_____

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A Lump sum payment of $200.00 due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community

restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.